

**ARIZONA SUPERIOR COURT
GILA COUNTY**

Date: 2/24/2014

PETER J. CAHILL, JUDGE
Division One

K. ST. LAURENT
Judicial Assistant

STATE OF ARIZONA,	CR2013000439
Plaintiff,	VICTIM CASE
v.	
MATTHEW LEE COX,	
Defendant.	

ORDER DENYING MOTION TO RECONSIDER

Re: Rejection of 1/27/14 Plea Agreement

This matter is before the court on the State's Motion to Reconsider the rejection of a presented plea agreement in the above captioned case. The plea-bargain that was agreed to by the parties contained terms that raised particular concerns for the court. The proffered agreement required, if it was accepted, both suspension of imposition of sentence and designation of the convictions as felonies at time of sentencing. As a result, the court would have to supervise Defendant on probation without him having the valuable incentive of an opportunity to "earn" misdemeanor designations. Because these two provisions considered together deprive the court of an effective tool that is used to improve the likelihood of success on probation, the court rejected the agreement having found that its terms were not appropriate.

FACTUAL AND PROCEDURAL HISTORY

It is alleged that, on several dates in August and September 2012, Defendant forged checks belonging to his father, Rex J. Cox. The three checks, totaling \$1,648.24, were then cashed in Payson, Arizona without Mr. Cox's consent. The Grand Jury then charged Defendant with three counts of Forgery, each a Class 4 felony, and Theft, a Class 6 felony.

On January 27, 2014, Plaintiff and Defendant presented their plea agreement for the consideration of the court. Under its terms, Defendant would plead guilty to Theft and Possession of a Forgery Tool, both to be designated as Class 6 felonies at the time of sentencing. The court was required to suspend imposition of sentence and had no discretion but to place Defendant on probation. Noting the plea agreement required that probation was mandatory, the court was especially concerned that the plea bargain had another mandatory, non-discretionary requirement. It required that the offenses be designated as felonies at sentencing. However, in the court's experience there is an advantage to supervising "Class 6 probationers" who have the opportunity to earn misdemeanor designations for their crimes. This practice increases the likelihood of a successful completion of probation. Consequently, the court inquired of counsel why an agreement depriving the court of any discretion to utilize this valuable tool—and at the same time mandating that the court supervise Defendant in the community, would be "appropriate." After statements of counsel, including a statement of the Victim's position on the matter, the court determined for these reasons that the terms of the agreement were not appropriate. As a result, and pursuant to Ariz. R. Crim. P., Rule 17.4, the plea bargain agreement was rejected. However, the issue was left open for further discussion.

At counsel's request, the case was recalled later that day. Plaintiff, represented now by a different deputy county attorney, argued again that there were reasons why a requirement mandating felony designations at time of sentencing was appropriate. First, counsel argued that in making an offer that requires felony designations it considered that there were separate counts and that the offenses were committed on separate dates. Second, counsel explained that if there was no plea and the case proceeded to trial, and if Defendant were convicted, he would receive mandatory prison time.¹ Third, the State reminded the court that Defendant had no prior felony convictions. Counsel acknowledged that the victim, Defendant's father, did ask that the felonies remain "undesigned" so Defendant could earn misdemeanor designations. In response, defense counsel informed the court that Defendant had requested that the felonies remain undesigned but that he understood that if the plea was rejected, the case would proceed to trial—that Plaintiff would not offer an amended plea agreement.

¹ At the time the plea agreement was reached and the issue addressed by the court, Defendant had no notice that Plaintiff would later allege multiple offenses not committed on the same occasion, pursuant to A.R.S. §§ 13-703 or 13-704. Without this allegation, Defendant would not be facing mandatory prison time if he were found guilty at trial. Plaintiff's Allegation of Multiple Offenses Not Committed on the Same Occasion was not filed until February 10, 2014, the same day it filed its Motion for Reconsideration addressed herein.

The prosecutor's arguments in favor of felony designations were, the court believes, more appropriate for consideration at the time of sentencing, when the court would, if presented with an appropriate agreement, rightfully consider such designations. But the issue here is instead the appropriateness of terms of an agreement that mandates probation supervision but at the same time deprives the court and the probation department of the benefits that arise when the probationer has the opportunity for misdemeanor designations. As the court explained, this possibility of misdemeanor designation is an important tool for probation officers to utilize in seeking compliance with terms of probation. The court is reluctant to take away this tool from probation officers merely because this happens to be what the parties have agreed to—or, more accurately, just because a prosecutor wants it this way. Lastly, it was acknowledged that while Plaintiff's counsel gave reasons for the court to exercise its discretion in designating the offenses as felonies at the time of sentencing, no good reason had been presented for the court to abandon that discretion entirely.

On February 10, 2014, the parties addressed the issue again. At this time, Defendant explained he did not wish to proceed to trial and, even with the felony designation, wished that the court would accept the plea agreement. Again, the court explained its concern with probation supervision and with the agreement taking away the court's discretion. Additionally, at this time, the court was able to address the victim directly. The victim, Defendant's Father, expressed his preference that the felonies be undesignated so that his son could possibly earn misdemeanors instead. In response, the court commented on the importance of victim input and the importance of preserving the independence of the judiciary. The court then made its final rejection of the plea agreement but left the matter open for further consideration upon Plaintiff's stated intention of seeking reconsideration.

That same day, Plaintiff filed its Motion for Reconsideration. In its Motion, Plaintiff argued that the court failed to make individualized consideration of the presented plea agreement. Furthermore, Plaintiff argued that Defendant had previously been charged with a felony offense that was ultimately reduced to a misdemeanor. See Payson Justice Court, cause no. CR20120000079.² However, Defendant did not take a position of the Motion. Now, the court addresses those arguments and the arguments presented at both hearings.

² According to Plaintiff's motion, Defendant's Possession of Drug Paraphernalia conviction in Payson Justice Court cause no. CR20130000079 was "reduced from a class six felony to a class one misdemeanor."

DISCUSSION

1. The Court Has Discretion to Reject Negotiated Plea Agreements.

It is clear from Rule 17.4(d) that it is within the court's discretion to accept or reject a negotiated plea agreement and that it is not bound by any provision regarding the sentence or term and conditions of probation. Ariz. R. Crim. P. 17.4(d). Furthermore, it is well established by case law that the court ultimately has the authority to approve or reject a bargain in the interests of justice. *State v. Lee*, 191 Ariz. 542, 959 P.2d 799 (1998); *State v. Super. Ct. In and For County of Navajo*, 183 Ariz. 327, 903 P.2d 635 (App. 1995) (trial court has responsibility of deciding whether to accept or reject plea agreement, and trial court's exercise of discretion in this regard will not be reversed except for clear abuse). Furthermore, "[t]he language in rule 17.4(a), allowing parties to 'negotiate' and 'agree' upon any aspect of the case, does not give the parties or lawyers the right to force unwilling judges to accept plea agreements with sentencing stipulations." *Espinoza v. Martin*, 182 Ariz. 145, 147, 894 P.2d 688, 690 (Ariz. 1995) (quoting *Espinoza v. Super. Ct. In and For County of Maricopa*, 180 Ariz. 608, 886 P.2d 1364 (1993)).

The freedom of the parties to negotiate and agree upon the terms of the agreement is clear. *State v. Corno*, 179 Ariz. 151, 876 P.2d 1186 (App. 1994). There is nothing that precludes bargaining regarding the designation of a class 6 as a felony. *Id.* at 154, 867 P.2d at 1189. In *Corno*, the defendant agreed to a plea that stipulated that the offense shall be designated a felony at the time of sentencing. *Id.* at 152, 867 P.2d at 1187. The trial court judge accepted the plea agreement at sentencing but believed the designation of the offense to be "unduly harsh" and stated that the offense should remain undesignated pending probation. *Id.* He stated that the parties were not free to bargain on designation and denied the State's request to withdraw from the plea. *Id.* The Court of Appeals held that the trial court judge was incorrect that the parties could not bargain on designation of an offense and remanded the case back to the trial court judge to either accept or reject the offered plea agreement. *Id.* at 155, 867 P.2d at 1190. The Court of Appeals stated that if the trial court judge accepted the agreement, he must designate the offense as a felony, but if the trial court judge rejects the agreement, the State and the defendant are permitted to withdraw from the plea. *Id.*

Here, the court agrees that the parties do have a right to negotiate the terms of a plea agreement. The parties, as in *Corno*, negotiated that the offenses be designated as felonies. However, as the case law in *Espinoza* and *Corno* indicate, the court is not *required* to accept that term as appropriate. The Court of Appeals in *Corno* stated that

a trial court cannot first accept a plea agreement, and then refuse to follow the terms at sentencing. That is not what occurred in this case. The court here, as recognized by the Court of Appeals in *Corno*, has the right to initially reject a plea agreement, regardless of the terms negotiated.

Ultimately, the court exercised its discretion, as it is entitled to, in considering and then rejecting the agreement of the parties. The parties are free to withdraw from their agreement if they wish. As the court understands the positions of the parties, Plaintiff insists that if the original terms are not found appropriate it has effectively withdrawn from the Agreement and it will take the matter to trial.

2. The Court Gave Individualized Consideration to Defendant's Plea Agreement.

The trial court has the responsibility of using discretion in deciding whether to accept or reject a particular plea agreement. *Superior Court*, 183 Ariz. at 330, 903 P.2d at 638. Abuse of discretion in accepting or rejecting plea agreement requires arbitrariness, capricious, or absence of adequate investigation of facts to enable the trial judge to make an intelligent decision, which in this context means the same as individualized consideration. *Id.* Individualized consideration occurs when the trial court conducts a change of plea proceeding, considers the seriousness of the charge, considers factual basis, announces its concerns about stipulated sentence, listens to argument from counsel, and reviews the case law. *Id.*

Here, Plaintiff argues in its Motion that the court did not give individualized consideration to Defendant's plea agreement. It argues that the court rejected the plea based on the court's preference for discretion and that preference "indicates that it stopped short of individual consideration of the merits of this case." State's Motion to Reconsider, p.3. However, this is not the case at all. Instead, the court did give full and ample consideration to the plea agreement. The court heard arguments on the plea agreement a total of three times (*made by multiple prosecutors and multiple defense counsel*). The court heard arguments from counsel for Plaintiff, Defendant, and even the victim, pursuant to Ariz. Const. art. II, § 2.1(4) and A.R.S. § 13-4423. The court considered Defendant's criminal history, the seriousness of these charges, the difficulties presented in supervising probationers, especially those convicted of Class 6 felonies without the opportunity of a misdemeanor conversion, and the requirement of an independent judiciary. Additionally, the court weighed the likelihood that Defendant would go to prison, if the case were to proceed to trial. On this fact, the

court relied on Plaintiff's assertion (*mistaken at the time the plea was negotiated and at the time of the arguments of counsel*) that Defendant would face mandatory prison time. Presumably in response to the court's rejection of the agreement, Plaintiff then decided to file an Allegation of Multiple Offenses Not Committed on the Same Occasion on February 10, 2014. Lastly, and in particular, the court has considered the need, especially in this case with these facts, to follow what are called *Evidence-Based Practices* for probation supervision. In total, the court met the requirements for individualized consideration necessary before accepting or rejecting any plea agreement.

3. The Court's Rejection of Plea Agreement Properly Considered the Need for "*Evidence Based Practices*."

In rejecting the offered plea agreement, the court considered the importance of undesignated felonies for probation supervision. As the court explained during arguments, undesignated felonies give probationers convicted of Class 6 felonies positive motivation needed to be successful on probation—and earn a misdemeanor designation. This ability to earn a lower classification is a useful tool that helps probation officers supervise defendants, especially those convicted of Class 6 felonies.

Current research shows that a properly designed and operated recidivism-reducing program can be effective at reducing crime rates. Crime and Justice Institute and Roger Warren (2007), *EBP to Reduce Recidivism: Implications for State Judiciaries*. Washington, DC: National Institute of Corrections, Executive Summary. The most effective programs utilize "*Evidence-Based Practices*" ("EBP") in considering offender motivation and the integration of appropriate sanctions as conditions for success. *Id.*

Motivation to change is a crucial aspect of EBP. "Because rewards are more effective than punishments in achieving behavioral change, providing incentives for behavior change through 'negative reinforcement,' such as relief from previously imposed sanctions or conditions, is more effective than threats of punishment, such as application of additional sanctions or conditions." *Id.* at page 37 (citing Crime & Justice Institute, *Implementing EBP in Community Corrections: The Principles of Effective Intervention* (2004)). Every offender must be treated fairly and equally and held accountable for his criminal behavior. *Id.* at page 54. Rather than having sentencing decisions made as a result of mathematical calculations and prescribed rules, EBP provide incentives and opportunities that allow a skilled, professional probation officer to shape an offender's future behavior. *See id.* at page 55.

The law in Arizona is that probation departments will utilize EBP in their supervision of offenders. See Administrative Directive No. 2010-27, adopting Arizona Code of Judicial Administration §§ 6-105.01 (Powers and Duties of Officers Evidence Based Practices), 6-201.01 (Standard Probation Evidence Based Practices) and 6-202.01 (Adult Intensive Probation Evidence Based Practice).³ Pursuant to these regulations, probation supervision practices for Class 6 felony offenders utilize the motivating factor provided by “open-ended” designations that allow defendants to earn a misdemeanor, rather than a felony. This is exactly the sort of motivation EBP advocates and it acts as a “carrot,” rather than a “stick.”⁴ If our criminal justice system is to truly favor recidivism-reducing EBP programs—as the law requires, then the ability of the court to determine felony/misdemeanor designation for a particular case ought to be preserved—and not improvidently restricted based on the wishes of one party to this litigation.

Of course, and as the court repeatedly assured counsel, a plea agreement that allowed—but did not mandate and did not require felony designation at the time of sentencing would be approved as an “appropriate” plea agreement. Plaintiff’s arguments, in large part, address only why the court should designate these offenses as felonies and not why it is appropriate for the court to approve an agreement where litigants (*and not the court*) decide how best to supervise a probationer. Where, as here, the parties have insisted on probation supervision it is, the court believes, a proper exercise of discretion for the court to insist it has all the EBP tools available. If the parties were to enter into an agreement with “appropriate” terms, it may be that the court will agree with Plaintiff’s counsel that felony designation be made at sentencing. Or, it may be that a deferred designation will, with an unsuccessful term of probation, result in felony designations. Or, with a successful completion of probation, the result may be misdemeanors. However, the principle of an independent judiciary requires that the court perform its judicial function under Rule 17.4(d) while keeping in mind applicable provisions of the Code of Judicial Administration.

Finally, Plaintiff claims that a misdemeanor designation did not work before, pointing out that Defendant’s misdemeanor conviction in Justice Court in 2012 was

³ The purpose of these sections of the Arizona Code of Judicial Administration is to outline the powers and duties, with emphasis on evidence based practices, of juvenile court directors, chief probation officers, probation offices, and surveillance officers. Arizona Constitution, Art. 6, § 3, A.R.S. §§ 12-253, 12-254, and 8-205 authorize the Supreme Court to establish powers and duties of officers. Gila County formally approved governance under Arizona Code of Judicial Administration §§ 6-105.01, 6-201.01, 6-202.01 on July 16, 2010.

⁴ While revocation is indeed a “stick,” the size of a class-6 “stick” is, in this court’s opinion, of considerably less consequence in modifying probationers’ behavior than is the prospect of serving the more lengthy prison terms that are presumed in more serious felonies, class 5 and above.

followed by these crimes. This shows, Plaintiff's counsel says, that an agreement mandating felony designation is appropriate and ought to be approved on reconsideration. However, it may actually show the opposite. Without a particular incentive to succeed on probation, without any incentive to achieve a benefit, Defendant committed, the Grand Jury says, another crime after his Justice Court misdemeanor. One deduction is that when Defendant has no incentive, no way to avoid a consequence (*just as he had no way to avoid a consequence in Justice Court*) he will once again recidivate. Instead, if the parties agreed to a plea bargain as suggested by the court, the possibility exists that with an incentive the result will be different. The court believes that with this Defendant, this Victim and these facts that the evidence based approach, with a powerful incentive to succeed and comparatively reduced consequence of failure, that only a different agreement would be appropriate.

Accordingly, having conducted a sufficiently thorough change of plea proceeding to address the matter at issue here, having considered the seriousness of the charges, having addressed its concerns about the agreement, listened to argument from counsel, and having reviewed applicable case law,

IT IS ORDERED that the State's Motion to Reconsider is **DENIED**.

cc: RONALD DeBRIGIDA	Office Distribution: COUNTY ATTORNEY COURT ADMINISTRATOR VICTIM ADVOCATE
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